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THE BROADBAND ASSOCIATION

September 7, 2012

EX PARTE

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Revision of the Commission's Program Access Rules, MB Docket No. 12-68; News Corporation and the DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control, MB Docket No. 07-18; Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., MB Docket No. 05-192.

Dear Ms. Dortch:

On September 5, 2012 members of the Coalition for Competitive Access to Content (CA2C)[1] including: Glenn Reynolds, USTelecom; Stacy Fuller, DIRECTV; Bill Wiltshire, DIRECTV/ Wiltshire & Grannis; Steve Pastorkovich, the Organization for the Promotion and Advancement of Small Telecommunication Companies; Jim Smith and Christopher Heimann, AT&T; Leora Hochstein, Verizon; Micah Caldwell, the Independent Telephone and Telecommunications Alliance; Jeb Benedict, CenturyLink; Alison Minea, DISH Network; Steven Fravel, the National Telecommunications Cooperative Association; Eric Keber, the Western Telecommunications Alliance; and the undersigned, met with William Lake, Michelle Carey, David Konczal, Nancy Murphy, of the Federal Communications Commission's Media Bureau, and Susan Aaron of the Commission's Office of General Counsel.

During the meeting, CA2C members discussed the policy positions supporting an extension of the cable exclusivity prohibition. The attached outline reflects the topics and issues that were discussed by CA2C members with Commission staff. Members of the CA2C also discussed the decision by the United States Court of Appeals for the District Of Columbia Circuit to affirm the Commission's last extension on the exclusivity prohibition in 2007. Although the Court noted that the Commission "anticipated" that a market "may develop" in which exclusive programming could exist but not be harmful to competition, members of the CA2C emphasized that such a marketplace has not yet developed.

[1] The CA2C is a diverse coalition of multichannel video programming distributors (MVPDs) that agree on core program access issues. Its formal members include video providers from the direct broadcast satellite, cable, and telco industries.

Rather, the underlying basis for the Commission's decision – and the Court's affirmation – remains present and, in some instances, has actually become worse. In particular, the number of vertically integrated networks remains largely unchanged and, as is the case with regional sports networks (RSNs), has increased substantially. Indeed, the Commission has consistently concluded on different occasions since the *2007 Extension Order*[2] was adopted that vertically integrated cable operators continue to have the incentive and ability to withhold access to affiliated programming,[3] as vertically integrated cable operators have made it clear that they will enter into competition-harming exclusive contracts if the exclusivity prohibition were allowed to lapse.

The CA2C also emphasized that while this incentive is increased with respect to RSN programming, the program access exclusivity prohibition continues to be necessary with respect to all vertically-integrated programming because the ability to offer a comprehensive line-up of diversified programming options that appeal to a wide audience and a variety of interests is critical for competing MVPDs, including new entrants, to constitute a viable competitive alternative to dominant incumbent cable operators.

Pursuant to Commission rules, please include this letter in the dockets identified above.

Sincerely,

Kevin G. Rupy
Senior Director, Policy Development

cc: William Lake
Michelle Carey
David Konczal
Nancy Murphy
Susan Aaron

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[2] See Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, 22 FCC Rcd 17791 (2007).

[3] *See e.g.*, Order, *In the Matter of AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1595, 26 FCC Rcd. 13206 (released September 22, 2011); *see also*, Order, *Verizon Telephone Companies and Verizon Services Corp., Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, DA 11-1594, 26 FCC Rcd. 13145 (released September 22, 2011); First Report and Order, *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd. 746 (2010).

CA2C Program Access Meeting
September 5, 2012
MB Docket 12-68

About the CA2C

- The Coalition for Competitive Access to Content (CA2C) is a diverse coalition of MVPDs that agree on core program access issues. Its formal members include video providers from the direct broadcast satellite, cable, and telco industries. The CA2C is also informally supported by consumer groups, such as Consumers Union.
- The CA2C was established in 2006 and participated in the FCC's deliberation of the 2007 extension of the cable exclusivity prohibition and the closing of the terrestrial loophole in 2009.

The FCC Should Extend the Cable Exclusivity Prohibition for an Additional 5 Years.

- ***The Characteristics of Vertically Integrated MVPDs, Remains Largely Unchanged Since the Last Extension in 2007.***
  - The number of vertically integrated national programming networks remains virtually unchanged at 115 (in 2007 there were 116).
    - The number of vertically integrated networks within the top 25 programming networks by subscribership increased from 6 in 2007 (24%), to 7 today (29%).
    - The number of vertically integrated networks within the top 25 programming networks by prime time rating has remained at 7 since 2002 (29%).
  - The number of vertically integrated cable operators has increased to 6 today (in 2007 there were 5).
  - The number of vertically integrated Regional Sports Networks (RSNs) has increased from 18 in 2007, to 57 today.

- ***Vertically Integrated Cable Programmers Retain Incentive and Ability to Harm Competition.***
  - Some vertically integrated programming, particularly RSNs, is non-replicable in nature.
  - When the FCC last extended the cable exclusivity prohibition in 2007, it concluded that the emergence of new MVPD competitors actually *increased* the incentive of vertically integrated cable companies to withhold programming.
  - Even with the presence of the program access rules, there have been a series of high-profile disputes impacting millions of consumers (*e.g.*, AT&T/Verizon v. MSG/Cablevision).
  - Although cable's dominant *national* market share is diminishing, several factors point to an increased incentive and ability to act anti-competitively,

particularly as a result of cable's continuing outsized *regional* market share and the growth of RSNs in key DMAs.

- ***Economic Theory Supports Retention of the Exclusivity Ban.***
  - If exclusive program carriage arrangements were economically efficient, one would expect program suppliers that are not subject to the cable exclusivity prohibition to use them. However, such exclusive arrangements are exceedingly rare, indicating that there is very little efficiency to be gained. To the contrary, the FCC has more recently seen independent programmers fighting to get onto cable platforms, particularly those of vertically integrated MVPDs (*e.g.*, Tennis Channel v. Comcast).
  - Due to the nature of video distribution, exclusivity necessarily restricts customer access and therefore reduces efficiency. Moreover, precisely because the interests of cable-affiliated programmers and cable operators are already aligned, they do not need exclusivity as a way to capture efficiencies through aligning the incentives of supplier and distributor.
  - Taken together, these factors imply that there likely is little benefit from MVPD exclusives and non-trivial costs in terms of a lack of access to customers.
  - Cable-affiliated programmers are most likely to withhold in precisely those cases where allowing a competing MVPD access to the programming would create pricing competition and expand output – both of which are pro-competition and pro-consumer.

Implementing a Partial Sunset Would Be Problematic and Ineffectual.

- ***Market by Market Solution Will not Work***
  - A market by market solution would be administratively difficult to implement. Even vertically integrated cable operators agree on this.
  - A market-by-market determination would be dysfunctional for a nationwide video service, such as the two satellite video providers.
  - The negative competitive impact of such an approach would be particularly acute in smaller markets:
    - Competitive imbalance between smaller, more rural MVPDs, and their competitors which are often larger, national, vertically integrated MVPDs.
    - Smaller MVPDs cannot afford to engage in protracted litigation on program access disputes or market-by-market determinations.

- ***Program-Specific Prohibitions Will not Work***
    - It would be difficult – if not impossible – to develop an objective process of general applicability to determine what programming, in which markets, may or may not be essential to preserve and protect competition.
    - In a world of bundled programming, the Commission would have to consider how to evaluate exclusive arrangements that apply to a suite of programming rather than to an individual network. This could make an already challenging line-drawing exercise more difficult still.

- ***Reliance Upon Remaining Program Access Provisions Would be Ineffective***
    - Even under the remaining program access provisions, competitive MVPDs would be required to devote enormous amounts of time and money to prove harm.
    - Smaller MVPDs would be at a particular disadvantage, due to their very limited resources as compared to those of their vertically integrated opponents.

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